Leader Publications

Product Liability

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FIREARMS

Detour Delays Ruling On Gun Makers

The first jury verdict in the nation against a gun maker for injuries caused by a properly functioning gun will likely remain in limbo for some time, as the U.S. Court of Appeals for the Second Circuit sent the case to New York's highest court late last month for the resolution of two critical state law questions.

The appeal to the circuit court in *Hamilton v. Beretta U.S.A.*, No. 99-7753, arose after a federal jury assessed more than $500,000 in damages against three gun makers in February 1999. The majority concluded that the New York Court of Appeals should answer the questions of whether the plaintiffs' negligent marketing theory is cognizable under New York law, as well as whether a market-share theory of liability could be used to apportion damages against the three gun makers that the jury held responsible for damages.

In February 1999, the jury returned verdicts against three of the 25 defendants based on their share of the national handgun market. In some instances, courts have accepted a market-share approach, where it is difficult, if not impossible, to show which product caused the damage.

One aspect of the Second Circuit's decision gave the plaintiffs a boost, as it refuted the defense claim that both the federal and state appellate courts had rejected a negligent marketing theory by distinguishing this case from the one involving the 1995 Long Island Railroad gunman, Colin Ferguson. (See related story, Page 6.)

INDOOR POLLUTION

'Sick Buildings' Can Pose a Plethora Of Product Liability Issues

By Samuel L. Tarry Jr. and Stacy L. Watson

Historically, commercial and residential buildings have not been considered "products" for purposes of determining liability. Most disputes between builders and purchasers were settled under the tenets of warranties or contract law. When personal injuries occurred, plaintiffs looked to jurisdictional law on premises liability. Sick building cases, however, have the potential to cross over into the realm of product liability law.

"Sick building syndrome" was recognized as a term by the World Health Organization in 1982. It is often applied to buildings with both real and perceived problems. Many problems that can cause sick building syndrome and other indoor air quality concerns arise in both commercial and residential buildings. The products initially at issue are almost as numerous as the types of personal injuries that can be alleged.

The most common cause of sick building syndrome is moisture intrusion into the building that fosters microbial growth. Other causes may include chemical off-gassing from carpet fibers, carpet backing and adhesives and other sources such as paint; other wall, ceiling and floor coverings; or even new office equipment and furniture. Moisture intrusion may be introduced into buildings through roofs, windows, doors and heating, ventilation and

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Sick Building Syndrome

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air conditioning (HVAC) systems and usually results from faulty design, manufacture, installation or operation and maintenance of these products. As a result of moisture intrusion, mold and other microbes may grow on insulation, wallboard, wallpaper, ceilings or carpeting.

Rarely is sick building syndrome caused by one source of moisture intrusion. In most cases, the moisture intrusion is a result of multiple product failures. These multiple failures can compound the problem and make it more difficult to diagnose the source of the moisture intrusion. For example, a building might have multiple leaks from the roof and from improperly installed windows. The natural reaction from the maintenance staff is to work methodically at repairing the leaks. It is not immediately obvious that the moisture intrusion may affect the quality of the indoor air. In addition to repairing the leaks, attention should be given to various aspects of the HVAC system, such as adjusting the level of moisture in the inside air or the amount of moisture introduced by the outside air, or inspecting the leaks that affect the HVAC system and any of its ductwork.

Samuel L. Tarry Jr. and **Stacy L. Watson** are members of the Environmental Litigation and Toxic Tort teams at McGuireWoods LLP. Mr. Tarry practices in Richmond, Va.; telephone (804) 775-1000. Ms. Watson practices in Jacksonville, Fla.; telephone (904) 798-3200.

Sick Building Damages

Sick building syndrome can create an array of potential damages. The economic impacts include expenses associated with identifying and remedying the problem as well as potential personal injury claims from the building's occupants. A building owner may need to engage an indoor air quality specialist, a forensic architect and a variety of contractors to remove and reinstall roofs, windows, doors and HVAC systems. Remedial work may include handling of mold and other microbes and may require special procedures to protect workers and occupants from additional exposure to those microbes.

The health impacts associated with sick buildings include a range of health problems, from minor allergy-type symptoms to severe cases of asthma and more serious health problems resulting from exposure to toxic fungi, which have been found in buildings with long-standing moisture intrusion

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problems.

When strict liability is alleged by plaintiffs with sick building syndrome, the question of whether an improvement to real property is a product becomes very important. That question can be especially crucial for manufacturers and suppliers of mass-produced items, such as window frames and HVAC condensers. The new Restatement (Third) of Torts defines "product" as "tangible personal property distributed commercially for use or consumption." The Restatement further notes that "other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property."

If a court determines that a real property improvement is a product for purposes of strict liability, the question may then turn to whether the manufacturer or supplier provided adequate warning. Given the fact that sick building plaintiffs typically allege an array of symptoms that may be idiosyncratic, defendants may successfully argue that sick building syndromes are so diverse in cause and effect that no product warning or cautionary label would suffice.

Strict liability may also attach against "sick building" defendants through design defect or manufacturing defect theories. Defending against either of these theories necessitates a fact-specific strategy that is common practice among traditional product liability defendants.

Sick-Building Lawsuits

One of the most remarkable cases involving sick building syndrome, *Centex-Rooney Construction Co. Inc. v. Martin County, Fla.*, was recently decided in south Florida. In that case, a jury awarded $11.55 million to the building's owner, Martin County, finding that the contractor failed to adequately supervise the construction of the building, which led to severe mold and moisture problems. The appellate court affirmed the award.

Shortly after the building became occupied, the county complained to Centex-Rooney about window and exterior wall leaks, mold growth and excessive humidity. The county attempted to repair the leaks and solve the air quality, but it was unable to resolve the humidity problems. As with most sick buildings, the occupants' complaints included both comfort and health concerns.

The county filed a breach of contract action, alleging that Centex-Rooney breached the construction management agreement by failing to supervise the construction properly. The agreement required Centex-Rooney to assume "complete oversight and control of the project, including responsibility for the selection of all subcontractors as well as the supervision, coordination, management and inspection of their work." Originally, the county also filed claims against the project architect and the concrete and masonry construction company. The county settled its claims against those parties prior to trial for $2.75 million. The county also dismissed its negligence claims, apparently because they were barred by Florida's economic loss rule, which disallows claims for tort damages in a breach-of-contract action.

The jury found that Centex-Rooney was responsible for the construction defects and that the defects had caused moisture problems, which led to extensive mold growth. The mold growth included two toxigenic molds. Approximately 60 percent of the exterior walls had visible mold. Additional structural and electrical defects were detected during the remediation of the obvious defects. The additional defects also contributed to the water infiltration into the building. They included improper window glass and frame installation, drainage system defects, severe rust and water damage of metal studs and fasteners and improper installation of the exterior synthetic hardcoat system.

Centex-Rooney argued that the county's action should be dismissed because, in the absence of an actual health hazard in the building, there were no actual damages. The court rejected that argument, finding that actual damages were established by showing defects in the construction of the building.

The Centex-Rooney case illustrates that a breach-of-contract action may or may not coexist with a personal injury claim. In at least one California case, tenants successfully argued that an HVAC system was a "product," which would subject the defendant to strict liability for the personal injuries sustained. The National Law Journal, Oct. 11, 1999, p. B12 (citing *Call v. Prudential*, No. SWC 90913 (Cal. App. Dept. Super. Ct. 1985).

How Companies Can Protect Themselves

Where negligence, strict liability or other product liability theories are asserted, "sick building" defendants should check the relevant state statutes to ensure that the building or improvement may be legally characterized as a "product." If the forum in question defines the building or improvement as a product, the next step should be to research any applicable statutes of repose. In many cases involving older properties, plaintiffs may find certain claims time-barred. If the claim is timely, a defendant may still succeed in persuading the court not to apply product liability analysis by arguing that the facts of the case do not meet the definition of "product" under the test defined by Restatement (Third) § 19.

Recognizing the causes of sick building syndrome is the key to avoiding litigation altogether. If a problem exists, early detection can save the day and potentially avoid the costs associated with personal injury claims. A thorough analysis of the location and purpose of the building can go a long way in identifying potential design concerns. All parties involved in the design, construction and mainte-

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ALLOCATION OF DAMAGES

Distinguishing Causal Apportionment From Comparative Fault

By Charles E. Erway III

In a number of states, a relic from the early days of "strict" product liability is that precedent generally does not permit assigning percentage shares of comparative fault to product liability plaintiffs. For example, some courts have held that a product plaintiff can be charged with fault only in the rare event that the plaintiff voluntarily assumed a known risk. Such barriers to assigning partial fault to the plaintiff can be quite unfair if the plaintiff greatly contributed to causing the harm. In such states, a possible alternative is to seek to apportion "causation" rather than fault.

The New Jersey Appellate Division, for instance, recently ruled that product liability defendants can rely on the doctrine of causal apportionment to apportion away damages partly caused by the plaintiff or decedent—including wrongful death damages—but the defendant has this burden of proof.

In *Poliseno v. General Motors Corp.*, 328 N.J. Super. 41, 56 (App. Div. 2000), Judge John Keefe recognized, in an automobile crashworthiness decision, that the causal apportionment doctrine is distinct from "New Jersey case law...that [generally a product liability] plaintiff's conduct is irrelevant in terms of *comparative fault*" (emphasis added). Accordingly, product liability plaintiffs' conduct that cannot be considered under comparative fault may, in some cases, be considered instead for causal apportionment of damages.

Poliseno indicates growing recognition by New Jersey courts that plaintiffs' contributory causation should be considered in product liability cases, when the damages are caused in part by factors unrelated to the product defect. This aspect of the decision is similar to *Dafler v. Raymark Industries Inc.*, 259 N.J. Super. 17 (App. Div. 1992), *aff'd o.b.*, 132 N.J. 96 (1993), which affirmed causal apportionment of a decedent's death between cigarette smoking and exposure to defendants' asbestos.

In *Poliseno*, a car hydroplaned off a wet road, striking a tree that crushed in the driver's side door. Allegedly defective welds between the car's door beam and door hinges broke, allowing the tree trunk to penetrate farther into the car than otherwise would have occurred. The driver died of brain injuries. The defective welds did not cause the accident, but allegedly caused or contributed to decedent's death. The jury attributed his death 80 percent to the accident and 20 percent to the defective welds.

The Appellate Division's *Poliseno* opinion addressed three issues: (1) whether plaintiff or defendant has the burden of proof on apportionment of crashworthiness damages, (2) whether death is an indivisible injury incapable of apportionment and (3) whether the jury instructions were adequate. *Poliseno* held that the defendant has this burden of proof, that death is subject to causal apportionment, but that reversal was required due to improper jury instructions.

Burden Shifting

The crashworthiness doctrine provides that if an automobile defect did not cause the accident but aggravated

Charles E. Erway III is counsel at Morristown, N.J.'s Porzio, Bromberg & Newman, where he focuses his practice on the defense of product liability and toxic tort matters in state and federal courts. Telephone: (973) 889-4215. E-mail: *cerway@pbnlaw.com*. A version of this article first appeared in the May 1, 2000, issue of the New Jersey Law Journal and is reprinted with permission.

Sick Building Syndrome Raises Product Liability Issues

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nance of a building must protect themselves with contractual provisions that allocate responsibility for properly managing the risks associated with their roles.

Owners may protect themselves by increasing their awareness of moisture intrusion concerns. This should be considered during the design and construction of the building, as well as the development of an operation and maintenance plan of a building. During design and construction of the HVAC system, the humidity of the climate must be considered. In more humid climates, less outside air may be needed and adjustments should be made to ensure appropriate balance of fresh air. This may also affect the schedule of the operation and maintenance needs of an HVAC system. Climate also plays a role in the design of the building's vapor barrier and whether the objective is to keep humidity inside or outside the building. For operation and maintenance, inspection practices should include looking for moisture problems. What may seem an innocuous leak from an HVAC duct may be a symptom of a larger problem.

Systems manufacturers may reduce their liability by reviewing the product labels and directions that are contained on HVAC systems, doors, window frames and the like. By providing explicit information about their products to distributors and installers, manufacturers may also avail themselves of the learned intermediary defense.

Contractors may protect themselves by asking the right questions from the start. It is important to ascertain who is responsible for addressing issues related to design of the building and certifying that a product is appropriate for the project. It is also important that the product specifications for installation are followed precisely. Finally, using skilled subcontractors and clearly communicating the building's requirements can go a long way toward minimizing the risks of litigation.

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